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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re AARON W., a Person Coming Under  
the Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES  
AGENCY,

Plaintiff and Respondent,

v.

CHERYL W.,

Defendant and Appellant.

G031936

(Super. Ct. No. DP003825)

O P I N I O N

Appeal from orders of the Superior Court of Orange County, Corey S. Cramin, Judge. Affirmed in part. Reversed in part and remanded with directions.

John L. Dodd & Associates and Ellen L. Bacon, under appointment by the Court of Appeal, for Defendant and Appellant.

Benjamin P. de Mayo, County Counsel, and Paula A. Whaley, Deputy County Counsel, for Plaintiff and Respondent.

Janette Freeman Cochran, under appointment by the Court of Appeal, for the Minor.

Cheryl W. (mother) seeks reversal of the juvenile court's order terminating her parental rights and freeing her son, Aaron W., now nearly three years old, for adoption. Mother contends the court violated her due process rights by denying her Welfare and Institutions Code section 388<sup>1</sup> modification petition without a hearing. She further challenges the termination order, asserting Orange County Social Services Agency (SSA) failed to comply with the notice provisions of the Indian Child Welfare Act (ICWA), 25 United States Code section 1901 et seq. As discussed more fully, *post*, we reject the challenge on the section 388 issue, but find the ICWA argument meritorious.

## FACTS

Aaron was taken into custody when he was born, November 2, 2000, while mother was serving a sentence for welfare fraud.<sup>2</sup> In a petition filed four days later, SSA generally alleged mother's failure or inability to protect the child and provide regular care due to her substance abuse and/or mental illness or developmental disability. In particular, the petition recited mother's extensive and unresolved history of illegal drug use throughout her adult life, including during her pregnancy, and her failure to obtain prenatal care until her incarceration at seven and one-half months gestation.

Essentially homeless for years, and with a criminal record including burglary, petty theft and welfare fraud convictions, mother had long ago voluntarily given the maternal grandmother custody of a son who was five years old at the time. Custody

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

<sup>2</sup> Because the father's identity was, and continues to be, unknown, the appeal involves no issue regarding him.

of another child, a 12-year-old daughter, had been awarded to the girl's father in family court. Aaron, initially placed in an emergency shelter home, was relocated to the Anaheim residence of a maternal aunt and uncle and their two daughters when he was 15 days old. He remained there for the duration of the proceedings.

In January 2001, the petition was sustained and Aaron was declared a dependent of the juvenile court. Over the course of more than two years thereafter, mother failed to maintain stable and suitable housing. She was turned out of a series of sober living facilities for not paying rent or not seeking employment. She often stayed in hotel rooms paid for by family members or shelter agencies. Although she invariably tested negative for drugs and regularly attended various component programs of her service plan, she steadfastly refused to acknowledge a connection between her substance abuse and her inadequate parenting. She insisted the sole reason for the dependency was her incarceration; she told the social worker she had no problem with drugs, marijuana did not interfere with her ability to raise her child, and she was going through the motions of counseling and testing only to appease SSA.

A court-ordered Evidence Code section 730 psychological evaluation at about the time of the six-month review hearing indicated mother suffered symptoms of delusional disorder and denial, both of which interfered with her ability to parent. For example, even when, more than seven months into her pregnancy with Aaron, a doctor confirmed her condition, mother denied she was pregnant, saying she had a cyst or tumor. She also insisted her pregnancy with Aaron's older half-brother had lasted *five years*, even though various medical providers had advised her to the contrary.<sup>3</sup> Before parental rights were terminated in Aaron's case, mother again became pregnant, but denied her

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<sup>3</sup> During this time, mother was hospitalized in a psychiatric ward where medical tests confirmed she was not pregnant and doctors so advised her. Nonetheless, mother continued to assert she had conceived in 1991 and delivered in 1995.

condition nearly until the child's delivery, saying she could not be pregnant because her boyfriend told her he had had a vasectomy.

Mother described her periods of self-chosen homelessness as ““hanging out at the park.”” She attributed her precarious circumstances not to her failure to obtain work or her substance abuse, but to her relatives' alleged refusal to give her a helping hand. The psychologist reported, “[Mother] consistently expressed an underlying belief that others should take care of her. She blamed parole not giving her money for her inability to pay rent, and her possibly getting evicted from her current sober living house. She blamed her father and other family members for not letting her stay with them and giving her money. She blamed [SSA] and [the juvenile court] for taking away her baby, stating, ‘I’m a victim.’ At no point did she express that she needed to get a job, find stable housing, and take initiative to improve her life. When asked how she would change things, her answers always included getting food stamps, welfare, MediCal and some sort of assistance from family or friends.” Perhaps even more significantly, mother told the psychologist, ““If I wasn’t being test[ed] I’d still be using.”” She said “she did not need the Perinatal program because she did not have a drug problem.” About Alcoholics Anonymous and Narcotics Anonymous, she complained she ““hate[d] those meetings,”” was not learning anything, and ““ha[d] nothing to discuss.””

Further, mother exhibited little insight about her child's needs or taking personal responsibility for meeting them. When asked how she would care for Aaron if he were with her, mother said, ““I would be on WIC for free milk and juices, and I’d be getting the food stamps. If I was starting on food stamps, he would be eating food with me, eating off my plate. I would have x amt in food stamps. His toys and clothing — of course, that would come from church, friends, and family.”” When asked about Aaron's emotional needs, she said, ““We’d be on MediCal, that’s basically it. He would need every need that I would need. At such a young age like that, it’s personal. It’s a part of you. My older son could get his own soda (out of the refrigerator). My nine-month old

couldn't get his own soda.' When questioned further on this point, she said, 'If he was living with me, he would need my mother natural maternal instincts — my ability to know what my child needs, what's he's feeling, when he's in pain, when it's time to potty train him, what stages of baby food he goes to, when it's time to go to table food. Those are natural maternal instincts. He needs love, a kiss, always [a] change [of] diapers, a bath, needs more visits from me.'”

The psychologist concluded mother's delusional disorder and her denial of a drug problem rendered her unable to properly care for her children and created a risk for Aaron. The report notes, “There is some evidence that [mother] has used other substances [than marijuana], however, she consistently denied it throughout all the interview and testing. [Mother] feels that there is nothing wrong with her marijuana use, and [she] has been using it . . . for the past 17 years. It appears that she used it during all of her pregnancies, and while she was in custody of her older children. She made it very clear that if it were not for the involvement of Social Services, she would continue to use marijuana. It is extremely likely that she will continue to use marijuana when Social Services stops monitoring her. Therefore, her marijuana use and refusal to stop compromises her parenting ability.” On this basis, and due to mother's delusional disorder, the psychologist recommended visits remain monitored.

By the time of the 12-month review hearing, mother's progress remained unsatisfactory, and SSA recommended termination of services. Mother had no stable place of residence, nor had she pursued any search for employment. She was committed to attending her therapy sessions, but was making no progress on her issues. For that reason, she had been discharged from the perinatal program. Her therapist expressed concern regarding mother's lack of awareness, her inability to accept responsibility for her actions, and her tendency to minimize or deny her problem with marijuana despite having smoked it every day for more than 15 years. Mother could not be discharged as a parolee because she was unable to care for herself. She was receiving food vouchers

from the state prison system, but her application for general relief had been denied because she failed to disclose she was receiving food vouchers and rent vouchers, as well as financial assistance from her father. The social worker observed such behavior was consistent with mother's previous welfare fraud conduct.

Despite mother's yearlong lack of progress, the court, rejecting SSA's recommendation to terminate reunification, extended mother's services for another six months. When the 18-month review hearing took place, matters had not improved, and mother's care providers agreed Aaron should not be returned to her. The therapist reported that mother failed to understand cause-and-effect relationships and would be unable to apply parenting techniques discussed in therapy sessions. Additionally, mother had been examined by a psychiatrist who opined she "has difficulty connecting thoughts together in a logical, meaningful sustained manner." Mother was seven or eight months pregnant, although, as noted, *ante*, she was in denial about it. She was still smoking cigarettes, notwithstanding her pregnancy and her admitted knowledge that smoke likely aggravated Aaron's asthma. She claimed to be drug-free, but continued to deny the relevance of marijuana use in relation to her ability to parent Aaron. She said she was under doctor's orders not to work at least until July. She was living in a motel room with her parolee mentally ill boyfriend. During the entire dependency period, she had never had an unmonitored visit with Aaron nor spent more than two consecutive hours twice weekly with him.<sup>4</sup> Aaron was "flourishing" in the care of his maternal aunt and uncle, and calling them "mom" and "dad." He was receiving "a great deal of attention, nurturing and care." The family had expressed an interest in adopting the child and a commitment to maintaining his contacts with mother.

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<sup>4</sup> Mother's visits varied from 45 minutes to two hours in duration, depending upon her own plans. She had been offered additional time with Aaron, but had shown no interest in increasing her visitation. The monitor observed mother experienced difficulty in calming Aaron and did not appear to have the means to cope with the child.

On May 7, 2002, at the 18-month review hearing, the court terminated reunification services and scheduled a permanency hearing under section 366.26 (the .26 hearing). In the interim, mother's boyfriend was incarcerated for a probation violation and mother gave birth to a new baby boy. Mother told the social worker she would need help if Aaron were returned to her, but she could manage as long as her boyfriend was around. The social worker reported she "ha[d] reason to believe that the child's mother has no [future] plans for obtaining the appropriate means to provide for a stable place of residence for the child, and or providing a stable source of income to financially care for the child."

After a series of continuances for issues relating to the ICWA, which we discuss separately, *post*, the .26 hearing was held on March 3, 2003. At the same time, the court considered mother's petition for modification under section 388, in which mother sought Aaron's return or the provision of further reunification services. In her declaration, mother attested she was free of illegal drugs, she was continuing to visit Aaron twice weekly, and he responded appropriately to her, hugging and kissing her and sometimes calling her "mommy." Mother further stated she was living at the Cypress Lodge Motel with her boyfriend and infant son. She said she had government benefits adequate to meet the needs of both children. She had scheduled "an appointment . . . to acquire affordable two bedroom housing," and she "expect[ed] to return to [unspecified] work" when she was able "to have, and recover from, [an unspecified] minor [hand] surgery." Concluding, mother declared, "I now possess the sobriety, maturity and love necessary to make Aaron's life safe, happy and secure. Should the court believe that now is not the right time for Aaron to come home, I would request that the court order additional reunification services. I believe it would be in Aaron's best interests to be returned to my care or to have additional time to reunify with me."

The court found that even accepting everything mother said as true, there was no showing regarding the child's best interests sufficient to warrant a hearing on the

section 388 petition. Determining the ICWA did not apply and finding no statutory exception to adoption applicable (§ 366.26, subd. (c)(1)(A)-(D)), the court terminated parental rights and freed Aaron for adoption.

## DISCUSSION

### *Denial of a Hearing on Mother's Section 388 Petition*

Mother contends the court erred in failing to conduct an evidentiary hearing on her section 388 modification petition. We disagree.

Section 388, subdivision (a) provides in pertinent part: “Any parent . . . having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstances or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of court previously made . . . . The petition shall be verified and . . . shall set forth in concise language any change of circumstances or new evidence which are alleged to require the change of order . . . .” Under subdivision (c) of section 388, the court shall order a hearing only “[i]f it appears that the best interests of the child may be promoted by the proposed change of order.” The parent seeking modification must “make a prima facie showing to trigger the right to proceed by way of a full hearing.” (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.)

As mother concedes, the prima facie showing requires a pleading establishing there has been a genuine change of circumstances or development of new evidence *and* the proposed modification order would be in the child's best interests. (See, e.g., *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529; *In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) Section 388 petitions “are to be liberally construed in favor of granting a hearing to consider the parent's request.” (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 309.) On appeal, the reviewing court reverses the juvenile court's decision only if

the parent establishes an abuse of discretion. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)<sup>5</sup>

Mother does not establish error. There was no showing of genuine changed circumstances or new evidence, except that mother had had another baby after denying, as she had with Aaron, that she was pregnant until she was nearly full term. Her asserted drug-free condition was nothing new: She had passed every drug test during the dependency, but still had not acknowledged a drug problem. Her routine visits with Aaron, albeit of greater frequency (twice per week, which was the outside limit set by *mother*), were still only two hours in duration and, more significantly, still monitored. Mother had not yet established suitable housing; after more than two years, she had only the prospect of making an *application* for public housing. She had an expectation of “return” to some sort of work,<sup>6</sup> but not until she had received her doctor’s postpartum okay *and* until she had scheduled, undergone and recovered from a “minor surgery” to her hand at some undetermined time in the future. Even under the required liberal interpretation of her petition, mother made no prima facie showing of changed circumstances entitling her to a hearing on her section 388 petition.

Moreover, there is nothing in the petition addressing the best interests of the child. The inquiry implicates at least three factors: “(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent [child] to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or

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<sup>5</sup> Citing *Aquino v. Superior Court* (1993) 21 Cal.App.4th 847 and *Looney v. Superior Court* (1993) 16 Cal.App.4th 521, mother asserts de novo review applies and authorities to the contrary are poorly reasoned. The argument is academic: Under either standard, the juvenile court’s decision passes muster.

<sup>6</sup> We note mother’s expectation of “return” to work appears questionable in light of her historical aversion to seeking employment.

ameliorated, and the degree to which it actually has been.” (*In re Kimberly F.*, *supra*, 56 Cal.App.4th at p. 532.)

Here, the factors uniformly support the court’s decision. The problems leading to the dependency — substance abuse and mental illness — were serious and ongoing. Mother’s drug history dated back to her teen years, and her use of illegal substances was uninterrupted by her pregnancies. She did not acknowledge any resultant risk of or actual harm to her children. She admitted to no drug problem; despite regular attendance at her substance abuse program, she was discharged after failing to make progress. She admitted she was simply going through the motions, and her mental health care providers had no reason to doubt her. In terms of mother’s marijuana habit and her ongoing delusional disorder, they concluded that without intensive services and mother’s full cooperation, she probably lacked the capacity for proper parenting.

However, mother’s cooperation appeared unlikely in light of her insistence there was nothing wrong with her. She agreed to take antipsychotic medications only if required to do so by court order. Further, she offered no proof she had fully cooperated with previous advice from her psychologist that she, for instance, reside in a board and care facility for the mentally disabled and have weekly therapy sessions with a professional skilled in working with the severely mentally ill. As a result, mother’s individual therapist, “normally . . . a strong advocate for family reunification,” would not recommend returning Aaron to his mother. Moreover, in a comparison between Aaron’s bond with his mother and with his caretaker family, mother drew the short straw. No further recitation of facts is necessary in this regard.

Mother argues Aaron should be returned to her so he can maintain his sibling relationship with the new baby, but there is no evidence of a significant relationship between the two, nor for that matter is there evidence that adoption by the caretakers will end the sibling contact. Indeed, the record shows the caretaker family has supported and nurtured Aaron’s contacts with his mother, his baby brother and his older

sister. Mother did not demonstrate that Aaron's return to preserve a recent developing sibling relationship would be in his best interest, such as to place his permanency on hold. The case upon which mother relies, *In re Hashem H.* (1996) 45 Cal.App.4th 1791, is inapt.<sup>7</sup>

Mother's alternative attack on the court's denial of an evidentiary hearing on her modification petition is that the order violated her federally guaranteed right to due process. She cites no authority for that generalized contention, and California courts have uniformly rejected it. As stated by our Supreme Court in *In re Marilyn H.*, *supra*, 5 Cal.4th at pages 306-307, "[D]eprivation of a right is supportable only if the conduct from which the deprivation flows is prescribed by reasonable legislation that is reasonably applied; that is, the law must have a reasonable and substantial relation to the object sought to be attained." Additionally, "[s]ections 366.26 and 388, when construed together and with the legislative scheme as a whole, *are* reasonable and bear a substantial relation to the objective sought to be attained." (*Id.* at p. 309.)

Moreover, the statute authorizing the modification petition provided mother with her constitutional right to "adequate notice and a meaningful opportunity to be heard." (*Lackner v. St. Joseph Convalescent Hospital, Inc.* (1980) 106 Cal.App.3d 542, 557.) As the court stated in *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1413, "[S]ection 388 [with its California Rules of Court<sup>8</sup> safeguards to prevent arbitrariness in precluding a hearing] is not facially unconstitutional, because it gives the court discretion whether to provide a hearing on a petition alleging changed circumstances." (See also, *In re Heather*

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<sup>7</sup> Among the many facts making *Hashem H.* distinguishable from this case is that the mother there presented the court with her psychotherapist's recommendation the child be returned to mother's custody. (*In re Hashem H.*, *supra*, 45 Cal.App.4th at pp. 1797-1798.) Here, of course, the professional providers were in agreement that return would place the child at risk.

<sup>8</sup> All further references to rules are to the California Rules of Court.

*P.* (1989) 209 Cal.App.3d 886, 891 [finding without merit mother's constitutional challenge to an order denying her section 388 petition without a hearing].) In short, the court's denial of the modification petition without an evidentiary hearing did not violate mother's procedural or substantive rights to due process.

### *Compliance with the Provisions of the ICWA*

Mother contends that until the .26 hearing was scheduled, SSA failed to provide any notice of the dependency proceedings to Indian communities as required by the ICWA. Thereafter, SSA gave notice that was materially deficient. Under these circumstances, argues mother, the court erred in terminating parental rights: Before proceeding, it should have required SSA to demonstrate full compliance with the ICWA. As we will now discuss, we agree.<sup>9</sup>

We first recite the factual and procedural context in which mother's ICWA claim arises. Within days of Aaron's birth and detention, mother told the social worker "there may be some American Indian Heritage on her mother's side of the family," but said she did not know the name of the tribe. Following up with the maternal grandmother, the social worker confirmed there was an Indian background — possibly

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<sup>9</sup> Mother asserts violation of the ICWA's notice provision constitutes jurisdictional error. We disagree, persuaded by the reasoning of our colleagues that "the remedy Congress provided for violations of the ICWA was not to void [the state court's] jurisdiction and transfer the matter to tribal courts but rather to allow parents and tribes to seek invalidation of any proceedings held in error." (*In re Antoinette S.*, (2002) 104 Cal.App.4th 1401, 1411; see also *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 709 [failure to provide proper notice is prejudicial error requiring reversal and remand]; and *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1265 ["Notice is a key component of the congressional goal to protect and preserve Indian tribes and Indian families. Notice ensures the tribe will be afforded the opportunity to assert its rights under the Act irrespective of the position of the parents, Indian custodian or state agencies." [Citation.] The failure to comply with the notice requirements of the ICWA constitutes prejudicial error unless the tribe has participated in or indicated no interest in the proceedings"].)

Cherokee — and obtained the maternal great-great-great grandmother’s full maiden and married name. For the next six months, the social service court reports noted, “The Indian Child Welfare Act does or may apply,” but set forth no information about SSA’s attempts to further investigate or to contact the Cherokees. The court report filed in November 2000 for the jurisdictional/dispositional hearing repeated the notation that the ICWA “does or may apply,” and identified Aaron as “possibly” an Indian child and “possibly” ICWA eligible. Once again, there was no reference to any investigative efforts initiated by SSA in that regard. Then, out of the blue, in July 2001, and in reports thereafter, the social worker stated, “The Indian Child Welfare Act does *not* apply,” (italics added) adding, “No new information has come to light[] which would warrant a new search.” There is no other explanation or justification for the conclusion regarding inapplicability of the ICWA.

At the eleventh hour, in December 2002, just prior to the scheduled .26 hearing, the issue surfaced anew when the maternal grandmother told the social worker the great-great-great grandmother was 100 percent Choctaw Cherokee. When asked why she had not supplied this information at the outset of the dependency, grandmother said she believed the relationship was too far removed from Aaron to require tribal notification.<sup>10</sup>

Belatedly, SSA gave notice of the proceedings to certain Indian tribes, groups and communities, at the same time seeking a series of continuance of the .26

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<sup>10</sup> The grandmother’s opinion, of course, was irrelevant: It is for the tribe to decide. “A determination of tribal membership is made on an individual basis, and blood quantum is not determinative. The Tribe’s decision that a child is or is not a member, or eligible to be a member, is determinative.” (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 470.) Thus, grandmother’s belief regarding the remoteness of the link did not relieve SSA of its affirmative duty to inquire regarding Aaron. (*Ibid.*)

hearing to facilitate the process.<sup>11</sup> Specifically, SSA notified the Bureau of Indian Affairs (B.I.A.), the Cherokee Nation of Oklahoma Indian Tribe, the Choctaw Nation of Oklahoma, the Eastern Band of Cherokee Indians in North Carolina, and the Keetoowah Band-I.C.W.A. in Oklahoma. Unfortunately, the notices, while identifying Aaron and his mother and their respective birthplaces and birth dates, failed to set forth the key piece of information which had been in SSA's possession from the outset of the dependency proceedings — the full name of the maternal great-great-great grandmother to whom Aaron traced his Indian heritage.

SSA received no response from some contacts, negative response from others. However, the Choctaw Nation of Oklahoma told SSA by letter that “all records are pulled by maiden names and date of birth” and “lack of information may hinder this process,” and cautioned, “To complete an accurate research one should complete an entire family tree.” The tribal letter also advised, “The Choctaw Nation of Oklahoma shall consist of all Choctaw Indians by blood whose names appear on the final rolls of the Choctaw Nation approved pursuant to Section 2 of the Act of April 26, 1906 (34 Stat. 136) and their lineal descendants.” The record is silent as to further efforts, if any, made by SSA to follow through with the search for Aaron's Indian heritage by forwarding the known full name of the great-great-great-grandmother.

At the .26 hearing, SSA's counsel asked the court to make a finding that the ICWA did not apply. Counsel stated, “Ample notice has been given, and those tribes that have responded have indicated the child is either not an Indian child under their tribe, or they have declined, after receiving appropriate notice, to respond.” The court inquired whether counsel had “filed the appropriate documents . . . so the court can make an

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<sup>11</sup> Under the ICWA, “No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary [of the Interior].” (25 U.S.C. § 1912(a); see *In re Antoinette S.*, *supra*, 104 Cal.App.4th at p. 1408.)

independent judgment on the evidence that you're presenting," to which counsel responded, "I think the court has a plethora of documents . . . . We have several green [postal receipt] cards with notice, we have letters from the tribe, and we have information in the last court report regarding our contact with the tribes." The court, basing its finding on "the evidence presented . . . and the court's ability to review those documentations," found the ICWA did not apply "unless mom has any additional evidence regarding any possible Indian heritage." Mother's counsel acknowledged he had no further evidence. He raised no objection to the ICWA finding.

The notice issue is presented for the first time on appeal, but we find it is not subject to waiver by the parent. (See, e.g., *In re Nikki R.* (2003) 106 Cal.App.4th 844, 849 ["Case law is clear that the issue of ICWA notice is not waived by the parent's failure to first raise it in the trial court"]; *In re Antoinette S.*, *supra*, 104 Cal.App.4th at p. 1408 ["Because the notice requirement is intended, in part, to protect the interests of Indian tribes, it cannot be waived by the parents' failure to raise it"]; *In re Marinna J.* (2001) 90 Cal.App.4th 731, 739 "[W]here the notice requirements of the Act were violated and the parents did not raise that claim in a timely fashion, the waiver doctrine cannot be invoked to bar consideration of the notice error on appeal. Our conclusion is consistent with the protections afforded in the Act to the interests of Indian tribes"]; *In re Desiree F.*, *supra*, 83 Cal.App.4th at p. 471 ["There is nothing either in the ICWA or the case law interpreting it which enables anyone to waive the tribe's right to notice and right to intervene in child custody matters"].)<sup>12</sup>

We turn to the substantive issue. 25 United States Code section 1901 provides, in pertinent part: "Recognizing the special relationship between the United

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<sup>12</sup> As did the *Marinna J.* court (*In re Marinna J.*, *supra*, 90 Cal.App.4th at p. 739), we disagree with *In re Pedro N.* (1995) 35 Cal.App.4th 183 to the extent it reached a different result. Where the issue is one of notice, application of a waiver is inconsistent with the ICWA's protection of Indian tribes.

States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds [¶] . . . [¶] (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe; [¶] (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and [¶] (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.” 25 United States Code section 1902 further provides: “The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.”

Under state law, in proceedings involving an Indian child, the court must “strive to promote the stability and security of Indian tribes and families.” (§ 360.6, subd. (b).) To that end, when the juvenile court knows or has reason to know the subject child is Indian, the agency seeking termination of parental rights must give the tribe specified notice of the proceedings and the right to intervention. 25 United States Code section 1912(a) provides: “In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify

the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. . . . No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe . . .”<sup>13</sup>

As used in the ICWA, “foster care placement” means “any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated.” (25 U.S.C. § 1903(l)(i).) The notice provisions of the ICWA were thus triggered when Aaron was removed at birth from mother's custody for temporary placement with the relatives and mother could not have had him returned upon demand. (See, .e.g, *In re Jennifer A.*, *supra*, 103 Cal.App.4th at p. 702 and cases cited therein [even though relative placement *actually* occurs in involuntary proceedings, the *potential* for court-ordered foster home placement is determinative of the notice requirement].)

25 Code of Federal Regulations part 23.11(d) sets forth in considerable detail the information to be provided to the Indian tribe in the ICWA notice. Notice “shall include the following information, if known: [¶] (1) Name of the Indian child, the child's birthdate and birthplace. [¶] (2) Name of Indian tribe(s) in which the child is enrolled or may be eligible for enrollment. [¶] (3) All names known, and current and former addresses of the Indian child's biological mother, biological father, maternal and paternal grandparents and great grandparents or Indian custodians, including maiden, married and former names or aliases; birthdates; places of birth and death; tribal enrollment numbers, and/or other identifying information. [¶] (4) A copy of the petition,

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<sup>13</sup> Rule 1439(b) provides the ICWA notice requirement “applies to all proceedings under section 300 et seq., including detention hearings, jurisdiction hearings, disposition hearing, reviews, hearings under section 366.26, and subsequent hearings affecting the status of the Indian child.”

complaint or other document by which the proceeding was initiated.” The same regulation further states, “In order to establish tribal identity, *it is necessary to provide as much information as is known on the Indian child’s direct lineal ancestors including, but not limited to*, the information delineated at paragraph (d)(1) through (4) of this section. (25 C.F.R. § 23.11(b) (2003), italics added.)

Clearly, these two federal regulations taken together mean SSA should have given notice to the appropriate Indian communities regarding the child’s great-great-great-grandmother. SSA’s argument to the contrary ignores the imperative of 25 Code of Federal Regulations part 23.11(b) to provide all known information.

SSA contends it complied with the ICWA in that it filled in the blanks on California’s official notification form, SOC 319, which has no blank eliciting information about the great-great-great-grandparents. SSA cites a sentence from *In re H. A.* (2002) 103 Cal.App.4th 1206, 1211, that “[c]ompliance [with the ICWA] requires no more than the completion of a preprinted form [SOC 319] . . . and the attachment of a copy of the dependency petition.” Actually, the case is somewhat more complex than this out-of-context sentence would indicate. We need not parse the particulars: Suffice to say *In re H. A.* does not purport to address the sufficiency of the completed form when the issue is failure to give the Indian tribe *known* information regarding the child’s direct lineal ancestors, i.e., great-great-great-grandmother, as required by 25 California Federal Regulations part 23.11(b). Additionally, we note *In re H. A.* itself *reversed* a termination order and published its opinion expressly “to call attention to the imperative of complying with the letter of the ICWA.” (*In re H. A.*, *supra*, 103 Cal.App.4th at p. 1209.)

SSA further asserts the guidelines are not binding on the state courts. True, appellate courts have so stated, together with the cautionary remark that “the construction of a statute by the executive department charged with its administration is entitled to great weight.” (See, e.g., *In re Desiree F.*, *supra*, 83 Cal.App.4th at p. 474.) We accord

great weight to 25 Code of Federal Regulations section 23.11(b) [i]nstructing us that “in order to establish tribal identity, *it is necessary to provide as much information as is known on the Indian child’s direct lineal ancestors including, but not limited to,* the information delineated at paragraph (d)(1) through (4) of this section. (Italics added.) We therefore have no difficulty concluding SSA’s failure to provide the known full name of the great-great-great-grandmother constituted a failure to fulfill its duty under the ICWA. The omission may have deprived the Indian community of the *only* piece of information through which Aaron’s heritage could be traced. The juvenile court’s failure to secure compliance with the notice provisions of the ICWA constitutes prejudicial error.

Finally, in regard to the delay that will be occasioned by our reversal of the termination order, we find *In re Kahlen W.* (1991) 233 Cal.App.3d 1414 instructive: “While we recognize the need for timely resolution of child custody proceedings, respondent cannot benefit from the delay it created. . . . The [ICWA] is explicit as to what is required. Ascertaining the correct notice procedure when a child’s status is uncertain is not difficult. A quick glance at the language of the statute and its attendant regulations provides the answer. [¶] The notice requirements of the Act and the governing regulations encourage prompt exercise of the right to intervene. [Citations.] However, the delay in this instance is the direct result of DSS’s failure to comply with the notice requirements of the Act. Section 1914 of the Act provides that any action placing an Indian child in foster care or terminating parental rights may be invalidated upon a showing that section 1911, 1912, or 1913 of the Act has been violated. Thus, despite the delay which necessarily will result, the matter must be remanded for reconsideration after adequate statutory notice is given. [¶] The tribe is not required to intervene nor do we suggest or imply that the tribe should intervene or that, if it does, it will prevail on the

positions it takes. [Citation.] It must, however, be afforded an opportunity to do so through the requisite statutory notice.” (*Id.* at pp. 1425-1426.)<sup>14</sup>

In closing, we advise SSA we are troubled by its apparent lack of effort to follow up on the information about Aaron’s Indian heritage, despite its knowledge, essentially from day one, of the full maiden and married name of Aaron’s great-great-great grandmother. There is *no* information in the files as to what, if anything, was done after the maternal grandmother disclosed the name of this direct lineal ancestor. Then suddenly, without explanation, the social worker prepared a report indicating the ICWA was *not* implicated in the proceedings. But as our Presiding Justice and colleagues have stated, “‘It is for the juvenile court, not [SSA] or its social workers, to determine whether the Act applies under a given set of circumstances.’” (*In re Nikki R.*, *supra*, 106 Cal.App.4th at p. 852.) The court is ill served in making that determination when SSA has taken so casually, so lightly, its own responsibility under the ICWA. Finally, SSA’s reliance on the limitations of the notification form, SOC 319, as an excuse not to include all *known* Indian ancestral information in its ICWA notice, is misguided. The ICWA is the source of SSA’s duty — not the preprinted form.

## DISPOSITION

The order of the juvenile court denying mother’s modification petition is affirmed. The orders terminating parental rights and freeing Aaron for adoption are vacated, and the matter is remanded to the juvenile court with directions to order SSA’s

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<sup>14</sup> It matters not that we are at such a late stage in the dependency. As stated in *In re Jonathan D.* (2001) 92 Cal.App.4th 105, 111: “[T]he tribe is entitled to receive notice whenever the court becomes aware of such heritage. ‘Notice is mandatory, regardless of how late in the proceedings a child’s possible Indian heritage is uncovered. [Citations.]’ [Citation.] A tribe may intervene in dependency proceedings at any time, even after parental rights have been terminated.”

compliance with the notice provisions of the ICWA. If, after proper inquiry and notice, no response is received from a tribe indicating the minor is an Indian child, all previous findings and orders shall be reinstated. If a tribe determines that the minor is an Indian child, or if other information is presented to the juvenile court suggesting the minor is an Indian child as defined by the ICWA, the juvenile court is ordered to conduct a new section 366.26 hearing in conformity with all provisions of the ICWA.

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IKOLA, J.

WE CONCUR:

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SILLS, P. J.

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RYLAARSDAM, J.